
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

TIMBER RIDGE, INC.,

Petitioner (Plaintiff below),

v.

Docket No. 33877

Certified Question

From the United States District Court for the
Northern District of West Virginia
(Martinsburg Division)

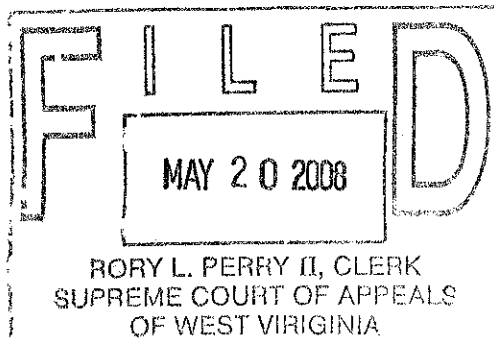
Civil Action No. 3:05-cv-00016

(Bailey, J.)

HUNT COUNTRY ASPHALT &
PAVING, LLC,
AND JEFFREY D. GREENBERG,

Respondents (Defendants below).

**TIMBER RIDGE, INC.'S REPLY BRIEF ON THE CERTIFIED
QUESTIONS FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA**



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COMES NOW Timber Ridge, Inc. (hereinafter "Timber Ridge"), and in reply to "Hunt Country Asphalt and Paving, LLC's Brief on the Certified Questions From the United States District Court for the Northern District of West Virginia" (hereinafter "Response Brief"), states as follows:

I. ARGUMENT

A. BECAUSE THE WEST VIRGINIA CONTRACTOR'S LICENSING ACT IS A REGULATORY STATUTE DESIGNED TO PROTECT THE PUBLIC, THIS COURT CAN INFER A RESTRICTION UPON THE USE OF THE COURTS BY UNLICENSED CONTRACTORS AS A MEANS OF ENFORCING CLAIMS THAT VIOLATE PUBLIC POLICY.

In its Response Brief, Hunt Country Asphalt and Paving, LLC (hereinafter "Hunt Country") argues that because the West Virginia Contractor's Licensing Act (hereinafter "Licensing Act") is silent as to whether a suit by an unlicensed contractor is barred, this Court should strictly construe the statute and not impose such a limitation. Further, Hunt Country argues that because the Licensing Act includes civil and criminal penalties, the Legislature did not intend to prohibit claims by unlicensed contractors. However, courts that have looked at statutes similar to the Licensing Act have held that contracts in violation of the licensing requirements cannot be enforced by an unlicensed contractor. Moreover, many of those courts have gone farther, stating that had the legislature intended to permit claims by unlicensed contractors in violation of the public policy expressed in the statute, such a provision could have been included in the language of the act.

Courts that have held that an unlicensed contractor can not bring a suit to enforce or recover on a contract against a property owner look to the intent behind the statute in inferring such restriction. See, e.g., Cooper v. Johnston, 219 So.2d 392, 283 Ala. 565 (Ala. 1969). In Cooper, the Alabama court drew the distinction between statutes that are enacted as

mere revenue raising statutes, stating that unlicensed contractors would not be precluded from bringing an action to recover on contracts under a revenue raising statute, and police protection statutes, under which the court would bar access to the courts and preclude recovery by such unlicensed contractors. Id.

Maryland courts have also upheld the prohibition against permitting the enforcement and recovery on contracts by unlicensed contractors, despite the contractor's licensing statute being silent, because the purpose of the statute is to protect the public. The Court of Appeals of Maryland, in Harry Berenter, Inc. v. Berman, 265 A.2d 759, 258 Md. 290 (Md. 1970), prohibited the unlicensed contractor from bringing an action to recover on a contract. The court held that if the purpose of the statute was to protect the public, rather than to merely raise revenue, then the unlicensed contractor could not use the courts to enforce its contracts as the enforcement of such would be against public policy. Id. The court also noted that if the legislature fails to indicate otherwise in a statute that is regulatory in nature, it will presume that contracts made by unlicensed persons are against public policy and cannot be enforced. Id. The court noted that had the legislature intended otherwise, it could have provided for such a cause of action in the statute. Id.

Like the statutes in Alabama and Maryland, the Licensing Act enacted by the West Virginia legislature is designed to protect the public by its express terms. The Licensing Act identifies its purpose and policy as follows:

It is hereby declared to be the policy of the state of West Virginia that all persons desiring to perform contracting work in this state be duly licensed to ensure capable and skilled craftsmanship utilized in construction projects in this state, both public and private, fair bidding practices between competing contractors through uniform compliance with the laws of this state, and

protection of the public from unfair, unsafe, and unscrupulous bidding and construction practices.

W. VA. CODE §21-11-2.

Like those courts in the above-mentioned cases, this Court should preclude unlicensed contractors from using the courts to prosecute claims against property owners. Such preclusion will further the intention of the Legislature in enacting the Licensing Act. Had the Legislature intended to permit unlicensed contractors to be able to enforce contracts entered into in violation of the Licensing Act, it would have included express language permitting such.

Hunt Country also asserts that the Licensing Act already includes those penalties that the Legislature had intended for unlicensed contractors performing work in West Virginia. However, the penalties under the Licensing Act only apply when an unlicensed contractor's status is discovered while the work is being done, and provide no protection after the work has been completed or the contractor has left the job site. As in the case underlying these certified questions, in situations where the work was faulty and the contractor left the job site months prior to the property owner discovering that the contractor was unlicensed, those penalties provide no deterrence nor assistance to the property owner. The issue is not whether the Contractors Licensing Board may impose a civil fine, but rather whether an unlicensed contractor can bring suit to recover on the contract that was entered into illegally.

Finally, Hunt Country asserts that this Court should infer that the Legislature's failure to include language barring unlicensed contractors from bringing suits to enforce their contracts after "...decades of jurisprudence on the matter, is a clear indication that West Virginia did not intend to provide the remedy the Plaintiff seeks." Response Brief at p.7. However, the same argument supports the District Court's finding that the Licensing Act bars such claims. The majority of jurisdictions interpreting statutes like the Licensing Act prohibit unlicensed

contractors from bringing an action to enforce a contract against a property owner. If the Legislature had intended to permit such actions, it could have amended the Licensing Act to permit such actions "in light of decades of jurisprudence on the matter." However, the Legislature has not amended the Act to permit such a cause of action, which would be completely antithetical to the public policy behind the Act.

B. THIS COURT SHOULD ENFORCE A COMPLETE BAR ON ACTIONS BY UNLICENSED CONTRACTORS THAT FAIL TO COMPLY WITH THE REQUIREMENTS OF THE WEST VIRGINIA CONTRACTORS LICENSING ACT.

As a fall back argument, Hunt Country asks this Court to create an equitable exception to a complete bar on lawsuits by unlicensed contractors. Courts have rejected the argument that unlicensed contractors that violate public policy and the licensure requirements of a state may still recover on a theory of equitable relief. See, e.g., Sumner Dev. Corp. v. Shivers, 517 P.2d 757 (Alaska 1974); Cooper v. Johnston, 219 So.2d 392, 283 Ala. 565 (Ala. 1969). In Sumner Dev. Corp. v. Shivers, the Alaska Supreme Court rejected the equitable assertions by the unlicensed contractor, stating that "engrafting equitable exceptions onto the enforcement policy at best aids the ignorant and gullible, whom the legislature sought to regulate..." 517 P.2d 757, 763 (Alaska 1974).

In Wagner v. Graham, 370 S.E.2d 95, 96 (S.C. 1988), the South Carolina Supreme Court rejected the argument that the contractor could recover on the basis of equitable relief or knowledge by the homeowner of the contractor's unlicensed status. The court stated that equitable relief did not apply in cases where the underlying action involved that of an unlicensed contractor, because the licensing statute was enacted for the benefit of the public and could not be circumvented based upon the facts of individual cases. Id. The Supreme Court of Alabama also rejected the application of equitable relief in actions by unlicensed contractors,

stating that equitable relief is not available as “[t]he transactions were illegal and violative of public policy. Vitality cannot be injected into an illegal transaction by way of estoppel.” Cooper v. Johnston, 219 So.2d 392, 396, 283 Ala. 565, 569 (Ala. 1969). The court in Cooper cited to Birmingham Water Works Co. v. Brown, 67 So. 613, 616, 191 Ala. 457 (Ala. 1914), in which the Alabama Supreme Court stated that “...it is a familiar doctrine that an agreement void as against public policy cannot be rendered valid by invoking the doctrine of estoppel.” Cooper v. Johnston, 219 So.2d 392, 396, 283 Ala. 565, 569 (Ala. 1969).

In its argument, Hunt Country requests that this Court hold that an illegal act by a contractor can be made valid under equitable theories of recovery. As noted above, courts hold that illegal conduct by an unlicensed contractor cannot form the basis of recovery under any equitable doctrine. The West Virginia legislature, in enacting the Licensing Act, explicitly states that such Act is for the benefit of the public. Any contracts entered into in violation of this Licensing Act are against public policy. Therefore, this Court should reject this argument by Hunt Country and enforce a complete bar on actions by unlicensed contractors.

C. THIS COURT SHOULD NOT CREATE AN EXCEPTION TO THE BAR ON ENFORCEMENT OF CONTRACTS BY UNLICENSED CONTRACTORS IN THOSE CASES WHERE THE PROPERTY OWNER IS AWARE OF THE UNLICENSED STATUS OF THE CONTRACTOR.

While already noted in Timber Ridge’s Brief on the Certified Questions, it must be stated again that Timber Ridge expressly denies any knowledge of Hunt Country’s or Jeffrey Greenberg’s unlicensed status at the time of the execution of the contract or at the time of performance. However, for the purposes of this argument, Timber Ridge asserts that even if it had been aware of Hunt Country’s or Jeffrey Greenberg’s unlicensed status, such knowledge should not act as an exception to the bar against an unlicensed contractor bringing an action against a property owner.

In its Response Brief, Hunt Country asserts that a property owner's knowledge of the contractor's unlicensed status warrants the application of the doctrine of equitable estoppel, so as to prevent a property owner from asserting a contractor's unlicensed status as a defense to a claim brought by the unlicensed contractor. However, with few exceptions, courts do not apply the doctrine of equitable estoppel to bar the property owner from raising such a defense. For example, in Cochran v. Ozark Country Club, Inc., 339 So.2d 1023 (Ala. 1976), the Alabama Supreme Court rejected the unlicensed contractor's argument that the property owner was estopped from asserting the unlicensed status and resulting illegality of the contract, stating that an unlicensed contractor could not, by way of estoppel, endow a transaction that is illegal and against public policy with validity.

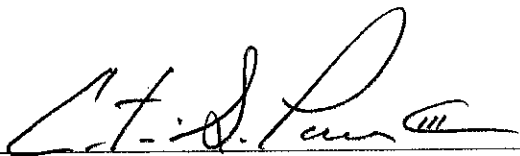
This Court should apply the same rationale applied by the Alabama Supreme Court in Cochran and the New York court in Millington v. Rapoport, which held that a property owner could not waive the statute enacted for the protection of the public and estoppel could "...not be relied upon to reward a practice that violates public policy," in holding that a property owner's knowledge of the unlicensed status does not prevent the property owner from raising such status as a defense to any action on the contract. 98 App. Div. 2d 765, 765 469 N.Y.S.2d 787, 788 (N.Y. 1983). The stated purpose of the Licensing Act is to protect the public and an unlicensed contractor should not be permitted to raise the doctrine of equitable estoppel to aid him in furthering his illegal conduct by allowing him to pursue a claim against a property owner, even where the property owner has knowledge that he is not licensed. This Court should answer the second certified question in the negative and find that a property owner's knowledge of a contractor's unlicensed status does not bar such property owner from raising the unlicensed status as a defense.

II. CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in "Timber Ridge, Inc.'s Brief on the Certified Questions From the United States District Court for the Northern District of West Virginia," this Court should find, as a matter of law, that a contractor who does not possess a valid West Virginia contractor's license may not utilize the courts to maintain a claim or counterclaim against a property owner, and should also find, as a matter of law, that the property owner's knowledge of a contractor's unlicensed status does not estop the landowner from raising the contractor's unlicensed status in defense to any claim or counterclaim asserted by the contractor.

Respectfully submitted,

TIMBER RIDGE, INC.
By Counsel

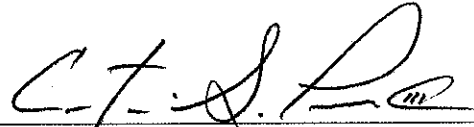


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CERTIFICATE OF SERVICE

I, Curtis G. Power, III, counsel for Timber Ridge, Inc., do hereby certify that on May 19, 2008, I have served a true and correct copy of the foregoing *Timber Ridge, Inc.'s Reply Brief on the Certified Questions from the United States District Court for the Northern District of West Virginia* upon the below named party on the date indicated by depositing a true and correct copy of the foregoing in the United States Mail, first class postage prepaid to him at his address as follows:

J. Michael Cassell, Esquire
Campbell Miller Zimmerman, P.C.
201 N. George Street, Suite 202
Charles Town, West Virginia 25414

A handwritten signature in dark ink, appearing to read 'C.G. Power, III', is written over a horizontal line.

Curtis G. Power, III